No. 80-814

# In the Supreme Court of the United States

OCTOBER TERM, 1980

SAFEWAY STORES, INC., PETITIONER

*v.*

NATIONAL LABOR RELATIONS BOARD

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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## TABLE OF AUTHORITIES


Page

Cases:

*NLRB* v. *Acme Industrial Co.*, 385 U.S. 432 ..... 3, 4

Statute:

National Labor Relations Act, 29 U.S.C. 151 *et seq.*:

Section 8(a)(1), 29 U.S.C. 158(a)(1) ..... 2

Section 8(a)(5), 29 U.S.C. 158(a)(5) ..... 2

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1. Petitioner operates a grocery distribution center in Richmond, California, where it warehouses grocery items to be shipped to its retail stores (Pet. App. A-2, C-6). Employees in four departments at the distribution center are covered by collective bargaining agreements providing for interdepartmental transfers (*id.* at A-2). In early May 1977, several employees transferred to the grocery warehouse department (*id.* at A-3). Less than 30 days later, petitioner informed 17 of these employees that they had failed to meet production standards and would be required to transfer back to their original departments (*id.* at A-3, C-7).

These 17 employees filed grievances with the Union[1] (Pet. App. A-3). On June 15, 1977, petitioner and the Union held

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[1]General Truck Drivers, Warehousemen Helpers & Automotive Employees Local No. 315, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America.

a grievance meeting at which the Union requested to see the production records, from January 1 through June 15, 1977, of all employees working in the grocery warehouse department (*ibid.*). Petitioner refused to provide the Union with the information, and the Union requested that the grievances be arbitrated (*id.* at A-4, C-7). Petitioner claimed that the collective bargaining agreements vested management with absolute discretion to return transferees to their old departments within 30 days of transfer and, therefore, that the return of the 17 employees to their old departments was not arbitrable (*id.* at A-4, C-8). The parties agreed to submit all issues concerning the grievances to an arbitrator (*id.* at A-10 to A-11, C-8).[2] On June 17, 1977, the Union filed an unfair labor practice charge with the Board based on petitioner's failure to produce the requested documents (*id.* at A-4).

2. A hearing was held before an administrative law judge on the unfair labor practice charge on October 27, 1977. On January 25, 1978, the administrative law judge ruled that petitioner had violated Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(5) and (1), by refusing to provide the Union with the requested information (Pet. App. C-4 to C-20). On June 21, 1978, the Board affirmed and adopted the administrative law judge's recommended order (*id.* at C-1 to C-3). It found that the information sought was relevant to the processing of the grievances and concluded that "before a union is put to the effort of arbitrating even the question of arbitrability, it has a statutory right to potentially relevant information necessary to allow it to decide if the underlying grievances have merit and whether they should be pursued at all" (*id.* at C-2). The Board ordered petitioner, *inter alia*, to provide

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[2]At the arbitration hearing several months later, the parties agreed that the arbitrator would first rule upon whether the transfer issue was arbitrable (Pet. App. A-4).

the requested information to the Union and to post an appropriate notice (Pet. App. C-17 to C-20).[3]

The court of appeals enforced the Board's order (Pet. App. A-1 to A-12). First, the court held that the Board did not abuse its discretion in failing to stay its proceedings pending arbitration (*id.* at A-5 to A-7). Second, the court held that under *NLRB* v. *Acme Industrial Co.*, 385 U.S. 432 (1967), the Union had a right to obtain the requested information before proceeding to arbitration (Pet. App. A-9 to A-11). The court noted that if petitioner had given the Union the information, the Union could have evaluated the grievances and "* * * might then have withdrawn its grievances without incurring the expense of arbitrating even grievability" (*id.* at A-10). Finally, the court held that the requested information was relevant to the collective bargaining duties of the Union (*id.* at A-11 to A-12). Accordingly, the court concluded that the Board's order should be enforced.

3. The court of appeals correctly found that this case is governed by *NLRB* v. *Acme Industrial Co.*, *supra*. In *Acme*, the question presented was "whether the Board must await an arbitrator's determination of relevancy of the requested information before it can enforce the union's statutory rights under § 8(a)(5)." 385 U.S. at 436. The Court held that where there was a "probability that the desired information was relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities," the Board was correct in requiring the employer to disclose the information before arbitration. *Id.* at 437. In the present case, the information sought by the Union—employee production records—clearly was relevant to the evaluation and

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[3]On December 1, 1978, the arbitrator issued his decision finding that the grievances were not arbitrable (Pet. App. D-1 to D-11). The arbitrator made no mention of the Union's information request.

processing of the transfer grievances because petitioner based its decision to revoke the employee transfers on the employees' failure to meet production standards.

Petitioner's claim that the disclosure of the information was not required until after the arbitrator's ruling on the arbitrability of the grievances ignores both the facts of this case and this Court's holding in *Acme*. Here all grievance issues—including merits and arbitrability—were submitted for arbitration.[4] Thus, the requested information was relevant to issues submitted for arbitration. Even if the arbitration had been limited to the arbitrability issue, however, *Acme* makes clear that the Union would have been entitled to the information in order to decide whether the grievances merited incurring the expense of arbitration. 385 U.S. at 438. Disclosure aids the arbitral process by allowing the early sifting out of unmeritorious claims without "intruding upon the preserve of the arbitrator" in construing the collective bargaining agreement. *Ibid.* Adoption of petitioner's view would encourage bifurcated arbitration proceedings in which employers arbitrate the question of arbitrability before disclosing information on the merits of a grievance and arbitrating the merits. By contrast, *Acme* seeks to avoid overburdening the arbitration system by allowing unions to evaluate grievances prior to arbitration. *Ibid.*[5] The court of appeals correctly held that, under *Acme*, petitioner was

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[4]Although the arbitrator's resolution of the threshold issue of arbitrability at the inception of the proceeding eliminated the need for him to decide the other issues, the Union never agreed to petitioner's desire to submit to arbitration only the issue of arbitrability.

[5]Petitioner's suggestions (Pet. 7-8) that disclosure of the information here was "a very substantial burden" on petitioner and that arbitrating arbitrability was "a small burden" both parties could share are not supported by the record. Petitioner produced no evidence regarding the number of documents involved in the information request and the cost of reproducing those documents or regarding the costs of arbitration.

required to disclose the requested information in this case, and its decision does not warrant further review by this Court.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
*Solicitor General*

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JANUARY 1981

DOJ-1981-01